

Members present: Vern Gardner, Craig Wilson, Brian Boyle, Brett Costa, Norm Leon

Members absent: None

Staff: Heather Ross, Assistant Code Enforcement Officer

The meeting was called to order at 7:00 p.m.

Mr. Wilson noted Title 16.1.5.2.F.2 gives the Board of Appeals the authority to hear the following variance appeal.

ITEM 1 – Stephen A. Hynes Trustee, Gary Beers, Agent, requesting a Administrative Appeal to a decision of the Code Enforcement Officer regarding proposed expansion of Yankee Commons Mobile Home Park on property located at US Route 1, Map 66 Lot 24 and 511 US Route 1, Map 66 Lot 25 zoned Residential-Rural, Mixed Use, Shoreland-Stream Protection and Resource Protection.

Gary Beers introduced Tom Harmon and Jay Stevens, Civil Consultants. He summarized the project to date:

- Application was filed on August 1, 2012 and heard by the Planning Board on September 12, 2012. The Planning Board determined the proposed material excavation was not incidental to construction of project.
- Attorney McEachern suggested the applicant could apply for a mineral extraction permit from the Code Enforcement Officer.
- The CEO made a decision on January 23, 2013, also determining the proposed mineral extraction was not incidental to the project.
- The applicant is requesting an appeal to this decision as the conclusions made by the Planning Board, Town Attorney and CEO were subjective, without any validating criteria in state law or Town Code.
- Application of such conclusion would reduce the density of the mobile home park expansion which is a violation of state law.

Brett Costa notified the Board his company had previously conducted work at the Yankee Commons Mobile Home Park. Board members and the CEO concurred there was no conflict of interest based on Mr. Costa's testimony.

Tom Harmon, Civil Consultants, summarized the proposed mobile home park expansion, noting expansions are allowed by state law. The estimated cost of the project is \$10 million. In order to meet the density as designed, and make it financially feasible, approximately 178,000 cubic yards of material would have to be removed, though some of the material will be used on site for roadways, pads, fill, etc. It is the applicant's belief the excavation is incidental to the project. The Planning Board determined the excavation was not incidental and advised the applicant to apply for an excavation permit. The decision of the CEO concurred with the Planning Board and further stated an excavation permit was not allowed in the zone the property is located. The applicant requested the Board of Appeals find the excavation is incidental to the project, which would allow them to move through the process. The application has been submitted to the DEP and an approval is expected shortly. He read from Title 16.2.1:

Except where specifically defined in this chapter, all words used in this title carry their customary dictionary meanings. Words used in the present tense include the future and the plural includes the singular; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the words "shall" or "must" are always mandatory; "occupied" or "used" are considered as though

followed by the words “or intended, arranged or designed to be used or occupied”; and, gender-specific words (e.g., she, he, his, hers) include the opposite sex equivalent.

Per Black’s Law Dictionary, sixth edition, 1990, definition of

Incidental: Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.

and

Incidental Use: In zoning, use of premises which is dependent on or affiliated with the principal use of such premises.

The applicant contends the principal use of the property is the mobile home park permit. He read from 16.9.1.2 Mineral/Earth Material Exploration and Removal: A. *Topsoil, rock, sand, gravel [and similar ear materials may be removed from locations where permitted under the terms of this code, only after a special permit for such operations has been issued by the Code Enforcement Officer upon approval and review of plans by the Planning Board] in accordance with the provisions of this code, and provided that nothing herein may be deemed to apply to normal excavation operations incidental to constructions activities for which a valid permit is held.* This says a mineral exploration permit is not required if operation is incidental to operation that is typical of this removal. The applicant is requesting an Administrative Appeal of the decision of the Code Enforcement Officer that the excavation is not incidental to the mobile home park permit; we believe it is. “With the Board’s approval of that we will then be able to move forward with our permit through the Planning Board.” If you feel this is not correct, and this is not incidental, we would not be able to get the number of units requested on this property.

Chairman Gardner asked if there was anyone wishing to speak to this project. There was none.

The CEO provided:

1. This project consists of two non-conforming vacant lots located in the Residential-Rural, Mixed-Use and a Shoreland and Resource Protection Overlay Zones.
2. The CEO has reviewed the project for a mobile home park expansion to determine if the mineral extraction was incidental to the overall project.
3. Mineral extraction is defined in the Code as: *any operation within any twelve (12) month period which removes more than one hundred (100) cubic yards of soil, topsoil, loam, sand, gravel, clay, rock, peat or any other like material from its natural location and to transport the product removed, away from the extraction site.*
4. It was specified in the application that approximately 178,000 cubic yards of material would be removed, or approximately 8,900 trips from the site in standard 20-yard dump trucks.
5. The CEO determined the mineral extraction in the amount specified was not incidental to the overall mobile home park expansion due to the extent of fill being removed.
6. The CEO in finding it was not incidental to the overall project, also found that it needed to be reviewed separately under 16.3.2.1 Residential –Rural zone where mineral extraction is allowed as a Special Exception.
7. In Title 16.3.2.13 Mixed-Use; Title 16.3.2.17.B.15 Shoreland Zone-Stream Protection-Mixed Use Zone; and Title 16.3.2.19.B Resource Protection Overlay Zone mineral extraction is not allowed.
8. The Board should now be reviewing whether the CEO was correct in determining that mineral extraction is not incidental to the project.

Mr. Wilson asked if a mineral extraction permit was received when the Kennebunk Savings Bank was built. The CEO stated that was before her time and she did not know. Mr. Wilson stated it is his experience that just to remove the loam on the roadway at Lewis Farm was more than 100 cubic yards. Unless the intent is to create an operation to remove material for remuneration, blasting and removal of rock and loam is part of normal operation and concurs it is incidental to construction. Testimony was presented that the essential geographic features of the site will remain the same, though it is a radical altering of the landscape. He also noted the Board can accept new evidence and asked the applicant if

there will be a submitting a landscape plan. The applicant stated there is. Mr. Wilson stated he was convinced the removal of material was necessary 'to achieve the site plane for installation, including the grade from site to street, speed and direction of stormwater flow, etc.' (page 5)

Mr. Leon noted he was concerned about how the trucks will reach Route 1 from site via Idlewood Lane. Mr. Harmon explained the roadway will be built up as blast is removed from the site, and some material will be left on site for future use. This will also be reviewed by the Planning Board.

Mr. Boyle asked what the community's interest is in mineral extraction. The CEO explained the Planning Board was concerned about the level of fill removal and asked for the CEO's determination regarding mineral extraction as a permitted use in the zone. She further explained given the large amount of material proposed to be removed and impact of the removal on the neighborhood led her to concur with the Planning Board and the Town Attorney that this was not subordinate to the project overall.

Mr. Costa believed the ordinance regarding mineral extractions was put in place to regulate gravel pits. In this case the removal is not a business to sell material but to build homes.

Mr. Gardner asked if material will be taken from the protected areas. The applicant stated there is a grading plan. Discussion followed regarding the protected and disturbed areas on the site. Mr. Beers stated the Board of Appeals has the full set of plans. Discussion followed regarding roadway grades, lot locations, etc. He noted the 77 lots is the minimum number of lots to make the project fiscally viable. The Town Attorney and Peer Review Engineer recommended fewer lots, but state law states you cannot enact or enforce an ordinance that requires lower density.

Mr. Leon asked about the disturbance on the existing mobile home park. Mr. Beers stated they have been offered the closest residents, approximately 12, new residences off Wilson Road.

Mr. Wilson asked about the open space. Mr. Beers stated the remaining 38 acres of open space will be designated open space in perpetuity if the project is approved by the Planning Board.

The Board has the authority under Title 16.1.5.2.F.2 to review this Administrative Appeal.

Mr. Leon moved to grant an administrative appeal to a decision of the Code Enforcement Officer regarding proposed expansion of Yankee Commons Mobile Home Park on property located at US Route 1, Map 66 Lot 24 and 511 US Route 1, Map 66 Lot 25 zoned Residential-Rural, Mixed Use, Shoreland-Stream Protection and Resource Protection.

Mr. Costa seconded

Motion carried unanimously

Findings of Fact

1. Gary Beers, agent, for Stephen A. Hynes Trustee, requested an Administrative Appeal to a decision of the Code Enforcement Officer regarding proposed expansion of Yankee Commons Mobile Home Park on property located at US Route 1, Map 66 Lot 24 and 511 US Route 1, Map 66 Lot 25 zoned Residential-Rural, Mixed Use, Shoreland-Stream Protection and Resource Protection.
2. This project consists of two non-conforming vacant lots located in the Residential-Rural, Mixed-Use and a Shoreland and Resource Protection Overlay Zones.
3. Mr. Beers testified that an application was filed on August 1, 2012 and heard by the Planning Board on September 12, 2012. The Planning Board determined the proposed material excavation was not incidental to construction of project, and were instructed to apply for a mineral extraction permit.
4. In the applicant's permit request, it was contended the proposed mineral extraction was incidental to the project and if the incidental mineral extraction is not allowed would create a reduction in density for the expansion, which is against state law.
5. Mr. Harmon, Civil Engineer, testified the \$10 million project comprised 50 acres, and mobile home park expansion is allowed by right.
6. There will be approximately 178,000 cubic yards of material, 8,900 truck loads, excavated. Some material will be used on-site though most will be removed. Extraction will take approximately 100 days.

7. The applicant stated the plan is currently under review by the DEP and final approval is anticipated.
8. Mr. Harmon read 16.2.1 Definitions Purpose, noting the definition of *incidental* is not defined in the ordinance. He also read the definition of *incidental* from Black's Law Dictionary. He further argued the principle use is to expand the mobile home park.
9. There was no public comment.
10. The CEO read excerpts from her Decision Letter of January 23, 2013.
11. There was Board discussion regarding the ability of Idlewood Lane to handle the truck loads leaving the site.
12. The Board viewed areas of disturbance and open space on plans prepared and presented by the applicant.

Mr. Boyle moved to accept the Findings as read

Mr. Costa seconded

Motion carried unanimously

Conclusion

The Board has the authority to hear an administrative appeal under Title 16.1.5.2.F.2 and determined the interpretation of mineral extraction in Title 16.9.1.2 did not apply, and the removal of material was incidental to the project.

Mr. Costa moved to accept the Conclusion as read

Mr. Boyle seconded

Motion carried unanimously

ITEM 2 – David Peyser requesting a disability variance to the terms of Title 16 Section 3.2.15D2 to add ADA ramp on property located at 1 Priscilla Terrace, Map 4 Lot 180 Mixed Use-Kittery Foreside.

Jim Loring, Attorney, explained the applicant is applying for a disability variance for Leslie Balkins to access a residence at 1 Priscilla Terrace. Prior to Ms. Balkins accident, they lived at 88 Pepperrell Road but the upper levels prohibited access by Ms. Balkins who is limited to a wheelchair. The Priscilla Terrace home is owned by Harry and Monique Wood who have agreed to allow the construction of a ramp to the residence, and the existing doors at Priscilla Terrace are wide enough for wheelchair access. They are requesting a variance to permit construction of a handicapped ramp alongside the main structure, within the 10-foot side setback. The applicants have a leasehold interest in the property, and the ramp structure would be removed should the applicants leave the property.

Chairman Gardner asked if anyone was in favor or opposed to the variance request.

Leslie Balkins spoke in favor of the disability variance, and noted the outpouring of support by many community members, and that the lumber to construct the ramp has been donated.

Abigail Ross, Ms. Balkins' daughter noted they had considered other locations, but the proposed side location appeared to be the most sound location for the ramp, and noted there was a fence between the abutting properties.

Harry Wood, owner, agreed to allow the construction of the ramp, noting it is be removed when the tenants leave the property.

Ron Tuveson – 64 Government Street – read from a prepared statement, noting:

- The proposed ramp location abuts their rear property line;
- There is an existing sewer line and easement (granted to St. Mark's Church) beneath the proposed ramp location;
- There are other workable alternatives for the ramp location.

- The proposed location forces the user to cross grass, uneven ground surfaces and a public street to access a vehicle on the opposite side of the house.
- Constructing the ramp to access through the front of the house provides a better and safer solution because the ramp supports will rest on asphalt for stability; front door access is to a one-level living area; there is safe and direct access to vehicles and an existing parking area; larger area provides a safe slope to distance ratio; the front setback in the MU-KF Zone is 0 feet; the large side lot provides parking for visiting medical and rehab personnel; front access maintains privacy of abutting property owner.

Mr. Boyle stated it appears tying the ramp into the side of the structure and to the front is possible. The ordinance states a disability variance granted 'should be the minimum necessary to meet the need'. There appears to be better options available, and suggested contracting with an experienced builder for a better location.

David Peyser, tenant, stated the Kittery Sewer Department assured him there is no sewer under the proposed ramp location, but is on the opposite side of the house. There is only nine feet of distance along the front of the house, creating a pitch which would be unacceptable and unsafe. The proposed side ramp allows for a 27-foot run on side and a straight entrance through the door, and the difference in floor height and deck can be accommodated. He stated he did not believe the front or rear entrance concepts are viable. There will be no excavating for the ramp.

The CEO stated the town owned sewer line is on the rear back corner of the property line and the private line appears to be alongside the area where the proposed ramp is located.

Mr. Tuveson noted there is no sewer line along the front of the property.

The CEO stated there was no violation on the construction. The property line issue is what brought this disability variance before the Board of Appeals.

Mr. Costa, Mr. Wilson and Mr. Peyser discussed the proposed and alternate ramp locations at the white board.

Mr. Leon moved to accept the disability variance request as submitted.

Mr. Costa seconded

Discussion followed regarding what the final design of the ramp should be and its location. Mr. Boyle stated if the Board proceeds with the motion, the decision is made and he believes the Board should provide further direction to the applicant. Mr. Wilson suggested Mr. Costa could withdraw his second of the motion.

Mr. Costa withdrew his second of the motion

All in favor of the withdrawal of the second

Mr. Wilson moved to grant a disability variance to construct a ramp to be located at the right side of the house (as looking from Priscilla Terrace) to the front door.

Mr. Costa seconded

Mr. Wilson requested the CEO and applicant work together to develop an acceptable design, as the Board does not have a final sketch to sign. The CEO agreed as long as the design of the front porch is no larger than necessary, and to include a turn to go directly into the home.

Mr. Gardner stated this would be considered a condition of the approval.

Mr. Costa recommended the addition of a four foot deck at the ramp end, leading to the access ramp to the front door to meet height, with stairs leading to the ramp deck.

Motion carried with 4 in favor, 1 opposed (Leon), 0 abstentions.

Findings of Fact

1. Disability variance request David Peyser requesting a disability variance to the terms of Title 16 Section 3.2.15D2 to add ADA ramp on property located at 1 Priscilla Terrace, Map 4 Lot 180 Mixed Use-Kittery Foreside.

2. Property is a conforming lot with non-conforming structures, with 10-foot side and front setbacks.
3. Proposal was to place a ramp alongside the structure to the rear, approximately 6" from the property line.
4. Testimony stated a private sewer easement (St. Mark's Church) existed in the location of proposed ramp.
5. Mr. Loring, attorney, outlined the application and request, noting the lease agreement by the applicant, and Ms. Balkins' disabilities.
6. Testimony was received from Ms. Balkins, Abigail Ross (daughter of Ms. Balkins) and Mr. Harry Wood, owner, in favor of the proposed ramp location.
7. Mr. Ron Tuveson, 64 Government Street, was opposed to the proposed location, concerned about privacy, rebutting issues concerning the proposed location, and read portions of his testimony for the record.
8. Testimony stated a van would pick up and drop off Ms. Balkins at the bottom of the ramp.
9. The Board determined the ramp could be accommodated on the right hand side of the house accessing the front door as opposed to the rear door, and the conclusion was that Mr. Peyser and the CEO would develop an acceptable plan, with a condition that that front landing be no larger than necessary to accommodate the swing of the wheelchair.

Mr. Boyle moved to accept the Findings as read.

Mr. Costa seconded

Motion carried unanimously

Conclusion

Under Title 16.1.5.2.F.3, the Board has the authority to hear this variance request. The Board also referenced Title 16.6.4.2.B, Disability Variance. In its motion, the Board gave consideration of Title 16.6.6.1 and 16.6.6.2, Basis for Consideration, and found them to be substantially in compliance.

Mr. Costa moved to accept the Conclusion as read

Mr. Boyle seconded

Motion carried unanimously

Minutes – March 12, 2013

Mr. Costa moved to accept the minutes as amended

Mr. Boyle seconded

Motion carried unanimously

Mr. Boyle moved to adjourn

Mr. Costa seconded

Motion carried unanimously

The Kittery BOA meeting of April 9, 2013 adjourned at 9:11 p.m.

Submitted by Jan Fisk,